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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

FREE NOW FOUNDATION, et al.,

Plaintiffs,

v.

**ERICA PAN IN HER OFFICIAL
CAPACITY AS DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH,**

Defendant.

2:24-cv-03523-DJC-SCR

**DEFENDANT CDPH'S OBJECTION TO
DECLARATIONS ATTACHED TO
PLAINTIFF'S SECOND AMENDED
COMPLAINT**

Filed Concurrently with
(1) Motion to Dismiss
(2) Request for Judicial Notice
(3) Declaration of Counsel
(4) [Proposed] Order

Date: August 21, 2025
Time: 1:30 p.m.
Dept: 7
Judge: The Hon. Daniel J. Calabretta
Action Filed: December 16, 2024

Defendant Erica Pan, in her official capacity as the Director of the California Department of Public Health (CDPH), hereby objects to the declarations attached to the Second Amended Complaint (SAC) filed by Plaintiffs Free Now Foundation; Brave and Free Santa Cruz; D.Q., by his Next Friend, Alix Mayer; A.R., by his Next Friend, Alix Mayer; T.E., by his Next Friend, Kathleen Lynch; and N.D., by his Next Friend, Kathleen Lynch (collectively, Plaintiffs) in support of their Second Amended Complaint (SAC). ECF No. 39.

OBJECTION

In ruling on CDPH's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court considers "the complaint itself and its attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice." *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). The SAC includes over 50 pages of declarations from individuals who are not parties to this suit. *See* SAC, at 94-140 (Exhs. 1-10). Such declarations "are not allowed as pleading exhibits unless they form the basis of the complaint." *United States v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003). Whether a document forms the basis of a complaint "turns on whether the complaint 'necessarily relies' on that document." *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013).

Here, the crux of Plaintiffs' claims is that California's current school vaccination statute, as enacted by Senate Bill 277 in 2015, violates their purported substantive and procedural due process rights under the Fourteenth Amendment. SAC, at 83-88. Plaintiffs are not pursuing a class action. The attached declarations (which do not appear to be from parents of school-aged children in California presently subject to California's vaccine mandate) have no bearing on the Court's analysis as to whether Plaintiffs have sufficiently stated a cognizable due process claim against CDPH. For example, the declarations have no bearing on whether Plaintiffs' fundamental rights are implicated or whether Plaintiffs were denied procedural due process.

Moreover, although Federal Rule of Civil Procedure 10(c) permits the Court to treat a "written instrument that is an exhibit to a pleading" as part of the pleading for all purposes, Plaintiffs' Exhibits 1-10 do not qualify as written instruments. A "written instrument" within the meaning of Rule 10(c) is "a document evidencing legal rights or duties or giving formal

1 expression to a legal act or agreement, such as a deed, will, bond, lease, insurance policy or
2 security agreement.” *DeMarco v. Depotech Corp.*, 149 F. Supp. 2d 1212, 1220 (S.D. Cal. 2001).
3 Exhibits 1-10 are declarations from non-parties opposed to vaccines.

4 Accordingly, the declarations within Exhibits 1-10 should be stricken pursuant to Federal
5 Rules of Civil Procedure 10(c) and 12(b)(6).

6
7 Dated: July 16, 2025

Respectfully submitted,

8 ROB BONTA
9 Attorney General of California
10 JULIE T. TRINH
Supervising Deputy Attorney General

11 /s/ Jacquelyn Young

12 JACQUELYN YOUNG
13 KATHERINE GRAINGER
14 Deputy Attorneys General
Attorneys for Defendant Dr. Erica Pan, in
her official capacity as the Director of the
California Department of Public Health

CERTIFICATE OF SERVICE

Case Name: **Free Now Foundation, et al. v. Pan** Case No.: **2:24-cv-03523-DJC-SCR**

I hereby certify that on July 16, 2025, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**DEFENDANT CDPH'S OBJECTION TO DECLARATIONS ATTACHED TO
PLAINTIFFS' SECOND AMENDED COMPLAINT**

I certify that **all** participants in the case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct, and that this declaration was executed on July 16, 2025, at Los Angeles, California.

Anthony Conklin
Declarant

Anthony Conklin
Signature